



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

JUL 18 2008

The Honorable Gabrielle Giffords
Member of Congress
8th District, Arizona
502 Cannon House Office Building
Washington, DC 20515

Dear Congresswoman Giffords:

Thank you for your July 10, 2008 letter regarding the traditional navigable water (TNW) determinations made on two study reaches on the Santa Cruz River.

Since the U.S. Supreme Court's decision in the Carabell-Rapanos cases was issued in June 2006, the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency ("Agencies") have been working together to implement the court's mandate as it affected Federal regulatory jurisdiction under Section 404 of the Clean Water Act. The joint Rapanos Guidance¹ was issued in June 2007, with a period for public comments that closed in January 2008. The comments received indicated the need for additional clarifying guidance with regard to jurisdictional terms like adjacency, TNW, and relevant reach, to name a few. The Agencies have made substantial progress on the guidance documents, several of which are currently undergoing interagency review at the Office of Management and Budget.

The Santa Cruz River is an important case in the context of its' geographic location in the arid southwest, an area with unique and challenging physical characteristics. COL Thomas Magness and the Los Angeles District are in the forefront in making TNW determinations in this geographic region. The Santa Cruz River determinations are the first major TNW findings in the region since the Rapanos Guidance was issued. These determinations coincide with the clarifying guidance documents nearing completion. Therefore, I felt it was important to have these determinations reviewed at the headquarters level to ensure that that are consistent with policy guidance currently being developed.

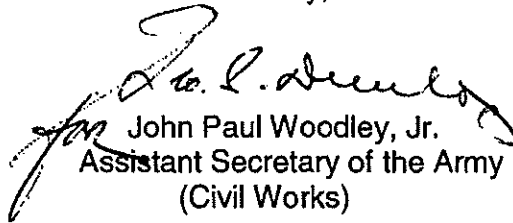
I wish to emphasize that the two TNW determinations made by COL Magness have merely been suspended pending completion of the review I have directed. These determinations have not been changed. Early next week, the Los Angeles District will host a field visit for staff from my office, the Corps headquarters, and the Army General Counsel's office to gather and review all the relevant facts. The review will be completed as expeditiously as possible.

¹ Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States

I would be pleased to follow-up with you on the outcome of the field visit and next steps. I am also available for a follow-up meeting with you upon completion of the review.

If you have any questions please contact Mr. Chip Smith, Assistant for Environment, Tribal and Regulatory Affairs, at (703) 693-3655 or Chip.Smith@hqda.army.mil.

Sincerely,



John Paul Woodley, Jr.
Assistant Secretary of the Army
(Civil Works)

Copy Furnished:

BG John McMahon, Commander, South Pacific Division,
COL Thomas H. Magness, Commander, Los Angeles District

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July 10, 2008

John Paul Woodley, Jr.
Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Room 3E446
Washington, DC 20310-0108

Dear Assistant Secretary Woodley,

I am writing to express my deep concern about the recent decision to suspend the U.S. Army Corps of Engineers' determination that two reaches of the Santa Cruz River in southern Arizona are Traditional Navigable Waters (TNW). I respectfully request that you provide an immediate and detailed explanation of the reasons for suspending this determination, the process used to arrive at the decision, and who initiated and ultimately made this decision.

On May 23, 2008, the Corps of Engineers' Los Angeles District issued a "Memorandum for the Record" that documented the Corps' determination that two separate reaches of the Santa Cruz River are TNWs. This memo details specific scientific and archival evidence that formed the basis for the determination. Furthermore, the memo plainly states that "this determination is consistent with the Clean Water Act (CWA), the agencies' regulations (including 33 C.F.R. §328.3), relevant case law, and existing guidance, including the June 5, 2007 joint U.S. Environmental Protection Agency and Department of the Army legal memorandum entitled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Rapanos Guidance) and *Appendix D of the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook issued June 5, 2007*." There is ample evidence that the Santa Cruz River has been navigated in the past, is currently navigable, and has reaches that qualify as TNWs.


I was further concerned by media reports on the suspension decision. According to a July 6 story in the *Sierra Vista Herald*, Mark Cohen, Deputy Chief of the Regulatory Division in the Corps' Los Angeles office, "was unable to explain what the headquarters 'policy' review process entailed. He said the focus was nationwide consistency with post-Rapanos decision-making." I find this explanation puzzling in light of the fact that the EPA and the Department of the Army

issued a joint legal memorandum over a year ago specifically to provide guidance on determining Clean Water Act jurisdiction in the wake of the Rapanos decision, and the Santa Cruz designations were consistent with that guidance. The issue of "nationwide consistency" would thus seem to have been addressed already.

Mr. Cohen was further quoted as saying that, "in spite of the review process... 'the Corps has not changed its Santa Cruz River (navigable water) determination.'" I would appreciate your clarification of these remarks. If the Corps has not changed its TNW determination, as Mr. Cohen seems to indicate, what is the purpose of the suspension? Is the TNW determination currently in effect or not? Is the determination under review? If so, please describe the review process, the criteria being used, and how these differ from criteria used to arrive at the original determination. What, if any, were the specific shortcomings of the original review? Finally, are there any other examples of a TNW determination being suspended anywhere else in the United States, or is this situation unique?

As I am sure you know, if this suspension were to become permanent, it would leave the entire Tucson watershed without protection under the Clean Water Act. This possibility is of great concern to me and my constituents. I would therefore be grateful for the favor of a swift reply to help us understand recent developments and the current situation.

Sincerely,



Gabrielle Giffords
Member of Congress (AZ-08)

Cc: Col. Thomas H. Magness, District Commander, USACE Los Angeles District